IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

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:: JUDGMENT ::

(1) Smt. Jhamku & Ors. Vs. Manoj Kumar & Anr.

S.B. CIVIL MISC. APPEAL NO.58/1992.

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(2) National Insurance Co. Vs. Jhamku Devi & Ors.

S.B. CIVIL MISC. APPEAL NO.71/1992.

Against the award dated 23.10.1991 made by the Motor Accidents Claims Tribunal (I), Udaipur in Claim Case No.212/1988.

Date of Judgment :: 15th May 2007.

PRESENT

HON'BLE MR. JUSTICE DINESH MAHESHWARI

Mr. N.K. Rastogi, for the claimants.
Mr. Sanjeev Johari with
Ms. Meenakshi Maheshwari, for the insurer.

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BY THE COURT:

These two appeals against the same award dated 23.10.1991 made by the Motor Accidents Claims Tribunal (I), Udaipur in Claim Case No.212/1988 preferred respectively by the claimants and the insurer have been heard together and are taken up for disposal by this common judgment.

Briefly put, relevant facts for determination of the questions involved in these appeals are that on 02.03.1988 at about 7:00 p.m. near Hanuman Temple in the city of Udaipur at Bhupalpura Circle, a motorcycle bearing registration No. RSY 3242 driven by Kishan Singh and taking pillion-riders Pratap Lal Teli and Badan Singh collided with a car bearing registration No. RST 7261; because of the accident, the motorcycle riders sustained grievous injuries; Pratap Lal went comatose and succumbed to the head injury on 05.03.1988. The wife, four minor children, and parents of the deceased Pratap Lal made the application for compensation against the driver-cum-owner and the insurer of the car RST 7261 on 11.07.1988. Narrating the incident aforesaid and imputing demise of Pratap Lal to the injuries received in the accident, the claimants submitted for quantification of compensation that the deceased was about 32 years of age and was in government service in the Irrigation Department getting salary of Rs.830/- per month, and with further income in private milk vending, was in all earning Rs.1,100/- per month and was contributing to the family minimum Rs.800/- per month. Stating their pecuniary and non-pecuniary losses and the liability of the non-applicants, the claimants sought compensation in the sum of Rs.3,26,750/- and further claimed Rs.15,000/- under

Section 92-A of the Motor Vehicles Act, 1939 towards interim compensation under no fault liability.

The non-applicant insurer in its reply, while admitting insurance coverage of the said car RST 7261, asserted that no any accident occurred by way of collision of the car with the motorcycle as alleged and then submitted in the alternative that the accident was brought about by the motorcyclist taking three riders and not being able to control the bike while coming to the main road from a side lane. Quantum of compensation claimed was also put to contention. In its additional pleas, the insurer averred that the drivers of the vehicles were not holding valid driving licence; that the accident occurred for exclusive negligence of motorcyclist; that the non-applicant having not been provided with the documents relating to the accident would reserve its right to amend or alter the reply; and that the motorcyclist being solely responsible for the accident was a necessary party and the claim application was not maintainable in his absence.

The non-applicant No. 1, driver-cum-owner of the car involved in accident, by way of his separate reply submitted that the motorcycle was going from west to east and he was taking the car from north to south on a straight road; that the motorcyclist came in a brisk speed negligently and hit against the rear mudguard of the car and thereupon the riders of

motorcycle fell down; and that the accident occurred for rash and negligent driving of motorcycle by Kishan Singh without any fault on the part of non-applicant No.1 who was taking the car with all caution at a speed of about 25-30 kms. per hour at the circle in abadi area. The non-applicant denied the factum of demise of Pratap Lal for want of knowledge, also put the quantum of compensation into contention, and submitted that he was not liable for any compensation.

On the pleadings of parties, the Tribunal framed the following issues on 21.11.1990:-

> "1- आया दिनांक 2-3-88 को श्री प्रतापलाल की मृत्यु वि0 नं01 श्री मनोज कुमार के द्वारा वाहन संख्या RST 7261 को गफलत व लापरवाही से चलाने के कारण कारित हुई ? प्रार्थीगण
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> 2- आया प्रार्थीगण कलेम में बताई गई राशि रूपया 3,26,750/- या अन्य कोई राशि प्रतिकार में विपक्षीगण से पाने के अधिकारी है ? यदि हॉ तो कितनी व किस किस से ? प्रार्थीगण
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> 3- आया बीमा कम्पनी के द्वारा जवाब दावे में उठाई गई आपत्तियों के आधार पर बीमा कम्पनी का कोई दायित्व नहीं है ? वि.नं. 2
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> 4- दादरसी ?"

On 21.11.1990 itself the Tribunal made the interim award for no fault liability against the non-applicants allowing compensation to the claimants in the sum of Rs.15,000/- together with interest @ 12% per annum.

Other pillion rider of the motorcycle, Badan Singh filed a separate claim application (Claim Case No.190/1988) seeking compensation in the sum of Rs.11,000/- for the loss suffered by him due to the injuries sustained in the same accident. After filing of the reply in the said claim application of Badan Singh, the Tribunal framed similar kind of issues on 21.11.1990. On this very date, the two claim cases were consolidated and thereafter evidence of the parties was recorded. Smt. Jhamku Bai, the present claimant-appellant No.1 was examined as AW-1; Badan Singh, the said other claimant was examined as AW-2; and Kishan Singh, the driver of motorcycle was examined as AW-3. On the other hand, Manoj Kumar, driver-cum-owner of the car deposed as NAW-1. The claimants produced documentary evidence including the charge sheet Exhibit-1, first information report Exhibit-2, site inspection memo Exhibit-3, postmortem report Exhibit-4, mechanical inspection report Exhibit-5, and last pay certificate of the deceased Exhibit-6. Relevant it is to point out that the non-applicant insurer, though filed a copy of the insurance policy in Claim Case No.190/1988 (of Badan Singh), but did not examine any witness. The order-sheets show that the statement of NAW-1 Manoj Kumar was completed on 11.09.1991 and the evidence of the non-applicants was closed and the matters were placed for final arguments on

04.10.1991. On this date, nobody appeared for the insurer, final arguments were heard, and the Tribunal posted the matter for pronouncement of award on 23.10.1991. On this date of 23.10.1991, the counsel appeared by filing Vakalatnama on behalf of the insurer in both the cases and at request, arguments were heard again and then the impugned award was pronounced.

So far the question regarding responsibility towards the accident is concerned, the learned Judge of Tribunal after referring to the facts available on record observed that without much dilatation it was proper to conclude that the riders of the motorcycle equally contributed to the incident when three persons were riding the motorcycle meant for riding of two persons and when Kishan Singh was driving the motorcycle without having a driving licence. With reference to the testimony of AW-2 Badan Singh and AW-3 Kishan Singh and so also after examining the statements of NAW-1 Manoj Kumar, the learned Judge formed the opinion that the car driver was also negligent and found that he had been challaned by the police after investigation for rash and negligent driving. Hence, the learned Judge concluded on issue No.1 that half of the negligence was on the part of motorcycle riders Badan Singh, Pratap Lal and Kishan Singh and other half of negligence was on the part of car taxi driver

Manoj Kumar and the accident caused injuries to Badan Singh and Pratap Lal; and, whereby, Pratp Lal died on 05.03.1988.

Taking up quantification of compensation in issue No.2 related to the present case the learned Judge observed that the claimant stated the age of the deceased at 32 years but the postmortem report put his age at 35 years hence it would be proper to take his age between 32 to 35 years. The learned Judge referred to the ripe old age of the parents of the deceased at 90 and 85 years and the fact stated by the wife of the deceased that they were engaged in milk vending and their daily needs were met by agriculture produces. The learned Judge also referred to the fact that Jhamku Bai admitted her having been accorded compassionate appointment in place of her deceased husband and her getting salary at Rs.500/- per month and the orders for allowing her full salary having been issued. The learned Judge took the average monthly income of the deceased at about Rs.1,000/- per month and deducting about one-third for his personal expenditure, estimated dependency of the claimants at Rs.700/- per month. After these observations the learned Judge observed that the law envisaged awarding of compensation and not profiteering; that reasonable amount might be allowed whereby interest income could support the claimants; and, therefore, awarding of a sum of Rs.1,00,000/- inclusive of the amount awarded under

Section 92-A of the Act would meet the ends of justice.

Taking up issue No.3 on liability of the insurer, the learned Judge observed that the insurer stated nothing significant in the reply for which it could be absolved of liability and hence issue No.3 was decided against the insurer.

After the discussion aforesaid, the Tribunal proceeded to make an award in all in the sum of Rs.1,00,000/- inclusive of the amount awarded under Section 92-A in favour of the claimants against the non-applicants and fastened liability upon the insurer and directed it to make payment within a month else the award amount would carry interest @ 12% per annum from the date of award.

Aggrieved of the award aforesaid, these two appeals have been preferred respectively by the claimants (CMA No.58/1992) and by the insurer of the car (CMA No.71/1992). The claimants have urged that the Tribunal has been in error in awarding a lump sum of Rs.1,00,000/- towards total compensation in this case without considering the fact that the deceased was in a settled employment with the government and had all chances of future enhancement of income; and that the Tribunal has further erred in not awarding interest from the date of filing of the claim application. The insurer on the other hand has submitted that the Tribunal has erred in failing to consider that its liability under the insurance policy in

question was maximum to Rs.50,000/-; and the entire liability of the award amount could not have been mulcted upon the insurer. It has also been submitted by way of an application under Order 41 Rule 27 CPC that though the insurance policy in question was produced on record in Claim Case No.190/1988 but for accidental omission, it could not be filed in Claim Case No.212/1988 that deserves to be taken on record. The insurer has also urged that for both the drivers not holding valid driving licence, in the first place, the insurer deserves to be exonerated; and secondly, the award in question deserves to be reduced with reference to the contributory negligence of the motorcyclist.

Having given thoughtful consideration to the rival submissions and having scanned through the entire record, this Court is clearly of opinion that the award in question deserves suitable modification by enhancement of the award amount and at the same time the appeal filed by the insurer deserves to be dismissed with costs being wholly bereft of substance.

So far the responsibility towards accident is concerned, it occurred at a traffic circle, named Bhupalpura Choraha. The car was proceeding from north to south whereas the motorcycle was going from west to east. In such collision at cross roads, ordinarily, the accident is brought about by

omission of care and caution on the part of both the vehicle drivers converging side ways. It has been suggested on the part of the car driver that the motorcycle came from side lane to the main road. The site plan Exhibit-3 shows that the point of incident is dot at the junction point of two main roads at the circle; and it does not appear correct to suggest that the motorcycle came from a side lane.

Though it has not been established that the motorcycle driver not having driving licence or taking of three persons on the motorcycle were the direct or proximate cause of accident yet, even if it be assumed that there was some contribution to the accident on the part of the motorcycle driver alongwith the car driver, the learned Judge has not considered that in the context of Pratap Lal, a pillion rider of motorcycle, such contribution of the two drivers were a case of composite negligence. When as a result of composite negligence of two vehicle drivers loss is suffered by a third person, he is entitled to claim compensation from both or either of the tortfeasors and, therefore, in relation to the loss caused to the claimants, the claim application could have been, and has rightly been, maintained against the persons related with the car. No part of the amount of assessed loss could have been reduced with reference to the contribution of the motorcycle driver to the accident. Of course, the deceased was on a motorcycle taking

three riders, and he was one of the three; hence, on that count some part of contribution of the deceased to the accident could have been considered because, to the extent of his own contribution, it would have been a matter of ‘contributory negligence’ and to that extent the quantum of loss could have been reduced; but in the present case there is no such cogent evidence on record for which definite contributory negligence could be imputed upon the deceased; and in the overall facts and circumstances, it does not appear to be fit a case for reducing the amount of compensation with reference to the contributory negligence of the deceased.

Therefore, the claimants are entitled to recover the amount of compensation for the loss suffered by them; and are entitled to recover the same from the non-applicants related with the car involved in accident.

Coming to quantification of compensation, this Court is unable to appreciate the approach of the learned Judge in referring to some aspects of income of the deceased and loss of contribution for the claimants and then abruptly picking up a figure of Rs.1,00,000/- to be awarded as compensation inclusive of the amount of Rs.15,000/- awarded under no fault liability. This Court is of opinion that while awarding compensation in a vehicular accident case, ordinarily it is expected of the Tribunal to award compensation on some

rationale, some basis, and some principles. May be in a given case the proposition of awarding lump sum compensation could be adopted having regard to the overall circumstances of the case but it cannot be adopted as a short cut in every case. In the present case, with all the necessary facts regarding the age and income of the deceased, age of the claimants and their dependency etc. being available on record, the learned Judge has obviously been in error in picking up a lump sum, and that too much lower than that of just compensation.

So far reference to compassionate appointment of the wife of deceased is concerned, learned Judge has failed to consider that in the present case compassionate appointment has been accorded to her by the employer of the deceased and has been accepted by her under the force of circumstances.; and she earns by way of such compassionate appointment after putting her own labour into the job and compromising against other amenities of life. In any case, so far the tortfeasors related with the car are concerned they have nothing to do with compassionate appointment accorded by the employer of the deceased; and such compassionate appointment is not of any mitigating factor towards the compensation payable by them.

It is of course true that the wife of the deceased has

stated that they were having milk vending business and were also getting reasonable agriculture produces but so far the pecuniary loss for the claimants is concerned, noticeable it is that the deceased was earning salary income of Rs.830/- per month as proved by the certificate Exhibit-6 and contribution therefrom has been a direct loss of the claimants. Having regard to the facts and circumstances of the case, when the deceased had been in a settled employment with the Irrigation Department of the Government of Rajasthan and was about 32-35 years of age, reasonable chances of future enhancement could not be ruled out either. In the overall facts and circumstances and the family set up, taking of average income of the deceased at Rs.1,000/- per month and providing Rs.700/- per month (Rs. 8,400/- per annum) towards average contribution as suggested by the Tribunal does not appear too low; however, the Tribunal has thereafter erred in not assessing the loss with proper application of multiplier. In view of the age of the deceased below 35 years, and looking to the lower side multiplicand at Rs. 8,400/- per annum, the assessment of loss deserves to be made with application of multiplier of 17 minimum.

Thus, taking the multiplicand at Rs. 8,400/- and with application of multiplier of 17, pecuniary loss itself stands at Rs. 1,42,800/- (8,400 x 17). The claimants deserve to be

allowed a minimum of Rs.30,000/- towards loss of consortium, love, affection, guidance and services the deceased. A further amount of Rs.2,000/- deserves to be allowed towards funeral expenses. Hence, total loss for the claimants stands at Rs. 1,74,800/- (1,42,800 + 30,000 + 2,000) and there appears no reason for not allowing such amount towards compensation in this case. Adjusting Rs.15,000/- received by the claimants under no fault liability, claimants are entitled for the remaining amount of Rs.1,59,800/-. The award as made by the Tribunal in a lump sum of Rs.1,00,000/- inclusive of the amount of Rs.15,000/- under no fault liability, obviously, remains too low and deserves upward revision.

The Tribunal has further erred in not allowing any interest on the award amount from the date of filing of claim application. No reason worth the name is available on record for which the Tribunal has chosen to deprive the claimants of reasonable interest. This Court is of opinion that ordinarily in a vehicular accident claim case the claimants are entitled for interest on the award amount from the date of filing of claim application and such component of interest should not be denied unless the claimants could be said to have intentionally delayed disposal of the claim application. There being no such intentional delay on the part of the claimants in the present case, they deserve to be allowed reasonable interest from the

date of filing of claim application. Having regard to the date of filing of claim application, the period of this litigation, and the quantum of compensation this Court is of opinion that interest of justice shall be served if the claimants are awarded interest @ 7.5% per annum on the entire award amount from the date of filing of claim application.

So far the appeal filed by the insurer is concerned, the submissions have been noted only to be rejected. Much has been sought to be developed in this appeal to submit that the liability of the insurer in this case remains limited to Rs.50,000/- as envisaged by Section 95 of the Motor Vehicles Act, 1939. The submissions sought to be made by the insurer turn out to be spineless when viewed in the light of the fact that there is neither any pleading nor any evidence on the part of the insurer to consider its plea of limited liability as per the statute. What to say of specific pleading on limited liability, not a remote suggestion has been made in the reply averments that the liability of the insurer was limited to any particular extent. Then, the insurer consciously choose not to lead any evidence at all. The application under Order 41 Rule 27 CPC filed in this case remains equally meritless. The Tribunal has not refused to admit any evidence nor the insurer ever attempted to lead any evidence. In the scheme of the beneficial provisions dealing with compensation for vehicular

accident, an insurer of the offending vehicle cannot be acceded the latitude that it would neither take appropriate pleadings nor lead evidence before the Tribunal and then would attempt to develop its case only in appeal.

This court in the case of United India Insurance Co. Ltd. Vs. Smt. Hukmi: 2006(2) MACD 798, while referring to a division bench decision in the case of The General Assurance Society Ltd., Jodhpur Vs. Smt. Chhagan Kanwar & Ors.: 1998 (1) RLW 369 has observed,-

> "The insurer never even suggested before the Tribunal that its liability is limited to the extent of statutory liability, whether in the reply or by leading any evidence or even in arguments. Therefore, the contention sought to be raised before this Court in appeal having no foundation at all in the case set up before the Tribunal, cannot be countenanced. This Court in the case of Chhagan Kanwar (supra) has dealt with such want of pleadings and evidence after considering the decision of the Hon'ble Supreme Court in Jugal Kishore (supra) and has held thus:
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> > "(11) The ground regarding the limited liability was not taken by the appellant
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> > before the trial Court. It does not find place in the written statement nor any evidence was produced by the insurance company. The insurance company though filed a detailed written statement but this objection was not taken by the appellant. The insurance company, also, produced in evidence NAW 1 Shri Murli Manohar Sippy – the Branch Manager, National Insurance company, Ajmer He, in his statement recorded during the trial, also, did not state that the liability of the insurance company is limited to the extent of Rs.50,000/-.

> (12) It is true that the strict rule of pleadings cannot be invoked in the claim petition but it is desirable that the claimants must known the case of the respondents, which they have to meet. Neither there was any pleading nor was there any issue framed by the learned Judge of the Tribunal regarding limited liability of the insurance company. If an objection regarding the limited liability would have been taken by the appellant insurance company before the trial Court then the claimants would have an opportunity to lead evidence to show that extra-premium was paid or any extra contract to cover unlimited liability was arrived at between the parties. In the absence of such pleadings and the evidence on record, the appellant insurance company cannot be allowed to agitate this ground in the appeal. The learned Single Judge was, therefore, right in holding the appellant insurance company liable to indemnify the full claim. The judgment passed by the learned Single Judge, therefore, does not require any interference."
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> The status of the plea sought to be raised in the present appeal obviously remains akin to that of Chhagan Kanwar's case (supra) and deserves to be rejected."

Want of specific pleadings and want of evidence in the present case too operate fair and square against the insurer and contentions sought to be raised In this appeal cannot be countenanced.

A feeble suggestion has also been made that the insurer was required to be exonerated for the car driver not

holding a valid driving licence. Again, the insurer has not led any evidence to consider such suggestion of violation of policy conditions for want of driving licence with the car driver; nor is it shown that want of licence was the direct or proximate cause of the accident. In fact, such case has not even been put in cross-examination of NAW-1 Manoj Kumar the driver-cum-owner of the Car. The appeal filed by the insurer being absolutely bereft of substance deserves to be dismissed with costs.

As a result of the aforesaid:

(i) the appeal filed by the claimants (CMA No.58/1992) succeeds and is partly allowed; the award made by the Tribunal is modified and, in place of the amount of Rs.1,00,000/- inclusive of the amount of Rs.15,000/- allowed under No Fault Liability as awarded by the Tribunal, the claimant are awarded compensation in the sum of Rs.1,74,800/-; and the claimants shall, therefore, be entitled for an amount of Rs. 1,59,800/- after adjustment of and above the amount of Rs.15,000/- awarded under No Fault Liability. The claimants shall also be entitled to interest on the entire award amount @ 7.5% per annum from the date of filing of claim application till payment;

After adjustment of the amount already paid, it shall be required of the insurer to deposit the remaining amount

payable under the award within 30 days from today with the Tribunal that shall proceed with appropriate apportionment and shall issue necessary orders for disbursement;

(ii) The appeal filed by the insurer (CMA No.71/1992) is dismissed;

(iii) The parties shall bear their own costs of CMA No.58/1992; however the appellant-insurer shall pay costs quantified at Rs.2,200/- in CMA No.71/1992 to the claimants.

(DINESH MAHESHWARI), J.

Ashwini